

EXHIBIT 5

N7ICedel

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 DR. SARI EDELMAN,

4 Plaintiff,

5 v.

21 Civ. 502 (LJL)

6 NYU LANGONE HEALTH SYSTEM, *et*
7 *al.*,

8 Defendants.

Trial

-----x

9 New York, N.Y.
10 July 18, 2023
9:00 a.m.

11 Before:

12 HON. LEWIS J. LIMAN,

13 District Judge
14 -and a Jury-

15 APPEARANCES

16 MILMAN LABUDA LAW GROUP PLLC
Attorneys for Plaintiff

17 BY: JOSEPH M. LABUDA
18 EMANUEL S. KATAEV

19 TARTER KRINSKY & DROGIN LLP
Attorneys for Defendants

20 BY: RICHARD C. SCHOENSTEIN
21 RICHARD L. STEER
22 INGRID J. CARDONA
23
24
25

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Porges - Direct

1 think I exceeded it at all. I think I was within 5 percent,
2 but mostly below.

3 Q. And because you were within a certain percentage, your
4 compensation was unaffected; correct?

5 A. Correct.

6 Q. Fair to say you averaged a little over 50 RVUs per month;
7 right?

8 A. On average, yes.

9 Q. And typically, that would lead to approximately a little
10 over 6000 RVUs every year; correct?

11 A. Yes.

12 Q. Except in COVID; right?

13 A. A little less in COVID.

14 Q. Because you met your RVU target and didn't really exceed
15 it, you did not receive any bonuses in any year from 2014
16 through the present; correct?

17 A. The first year I ever received a bonus was actually last
18 year in 2022.

19 Q. Prior to 2022, you did not receive any bonus; correct?

20 A. Correct.

21 Q. In your practice, you never really had any issues with the
22 Epic system when it came to communications; right?

23 A. There were occasionally IT issues, but nothing major.

24 Q. Never was there any issue that lasted for months and
25 months; correct?

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Porges - Cross

1 THE COURT: Overruled.

2 A. So, they approached me.

3 Q. OK. And what did you tell them about your practice?

4 A. I sat down with them together with Dr. Brancato, together,
5 and I reviewed the, the, the relevant issues about my practice.
6 Financial, referrals, my history before, before opening the
7 practice, all those things were discussed.

8 Q. And your background, was that discussed?

9 A. Yes.

10 Q. Now, you ultimately came to an agreement to join NYU?

11 A. Yes.

12 Q. And did NYU assume any business loans on your behalf?

13 A. No.

14 Q. Did NYU -- in terms of the lease, did NYU assume a lease?

15 A. Yes.

16 Q. For what period of time was that lease assumed by NYU?

17 A. So, the lease was ending very shortly, I believe I joined
18 NYU as of November 1, and I believe the lease ended December
19 31, January. Within, within two months of me joining NYU, the
20 lease was over.

21 Q. And other than that, did NYU assume any lease?

22 A. That's the only lease.

23 Q. Now, did there come a time where you discussed with NYU
24 taking on an administrative role?

25 A. Yes.

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Modi - Direct

1 (In open court)

2 THE COURT: Dr. Modi, you may come up.

3 Dr. Modi, please stand up. My deputy will administer
4 the oath.

5 ANANG MODI,

6 called as a witness by the Plaintiff,

7 having been duly sworn, testified as follows:

8 THE DEPUTY CLERK: Please state your full name for the
9 record and please spell out your first and last name.

10 THE WITNESS: Dr. Anang Modi. First name A-n-a-n-g,
11 last name Modi, M-o-d-i.

12 MR. LABUDA: May I proceed, your Honor?

13 THE COURT: Yes.

14 DIRECT EXAMINATION

15 BY MR. LABUDA:

16 Q. Good morning, Dr. Modi.

17 A. Good morning.

18 Q. You're a rheumatologist; correct?

19 A. Yes.

20 Q. And if you could just speak up into the mic a little bit.

21 A. Yes.

22 Q. Much better.

23 So just briefly describe what you do as a rheumatologist.

24 A. We treat a lot of musculoskeletal and autoimmune joint
25 diseases.

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Modi - Direct

1 Q. And in terms of treating, what is it exactly that you do in
2 terms of treatment for the patients?

3 A. Could be anywhere from medications, physical therapy,
4 injections.

5 Q. So you do doctor visits with the patients and then based on
6 those visits, you prescribe a certain type of treatment for the
7 patient; correct?

8 A. Correct.

9 Q. You have a CV; correct?

10 A. Yes.

11 MR. LABUDA: I'd like to show the witness exhibit 46,
12 which I believe is in evidence.

13 MR. STEER: I believe it is, your Honor.

14 THE COURT: You may do so.

15 Q. Dr. Modi, this is your CV; is that correct?

16 A. Yes.

17 Q. And you are a board certified rheumatologist; correct?

18 A. Correct.

19 Q. And you went to New York College of Osteopathic Medicine;
20 correct?

21 A. Correct.

22 Q. And you graduated in 2001; correct?

23 A. Yes.

24 Q. And the New York College of Osteopathic Medicine, that's
25 the same medical school that Dr. Edelman went to; is that

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Modi - Direct

1 correct?

2 A. I believe so, yes.

3 Q. And you also did your residency in internal medicine at
4 Winthrop University Hospital; correct?

5 A. Correct.

6 Q. And that finished in 2004; correct?

7 A. Correct.

8 Q. And Dr. Edelman also did her internal medicine residency at
9 Winthrop, as well; correct?

10 A. That's correct.

11 Q. After that, you did your rheumatology fellowship; correct?

12 A. Correct.

13 Q. And that was at Winthrop University Hospital; correct?

14 A. Correct.

15 Q. And that's also where Dr. Edelman did her rheumatologist
16 fellowship; correct?

17 A. Correct.

18 Q. You finished your fellowship in 2006; correct?

19 A. Correct.

20 Q. And Dr. Edelman was a year or two behind you; correct?

21 A. Two years, yes.

22 Q. Same education path. Did you guys know each other in
23 medical school and all these fellowships?

24 A. Medical school, no. Residency and fellowship, we were
25 colleagues.

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Modi - Direct

1 A. Yes.

2 Q. And that still happens today, right, they still send you
3 monthly reports?

4 A. Yes.

5 Q. And then at the end of the year, you also get an annual
6 report of how many RVUs you hit; correct?

7 A. Correct.

8 Q. Do you have any recollection about, in any of the years,
9 '17, '18, '19, '20 into '21 of whether or not you got any
10 bonuses, like incentive bonuses?

11 A. You get a bonus if you exceed your target RVU.

12 Q. Yes. What I'm asking you is, do you remember receiving any
13 bonuses in any of those years?

14 A. Which years specifically?

15 Q. We can go year by year. First year, '17 to '18?

16 A. I don't believe so. I met my target RVUs.

17 Q. You were at least within 5 percent of the target; correct?

18 A. Correct.

19 Q. What about the second year, '18 to '19, do you have any
20 recollection?

21 A. I met my target RVUs.

22 Q. But no incentive pay?

23 A. No.

24 Q. What about the third year? That would be, I think, '19 to
25 '20.

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Modi - Direct

1 A. '19 to '20, I do recall that I met my target exactly. I
2 was on the verge of exceeding my target significantly, but
3 unfortunately, COVID happened, and we saw about a 20-percent
4 drop in our RVUs. However, despite the COVID year, I was able
5 to meet my 6100.

6 Q. And NYU gave all the doctors a pass for the COVID just
7 because of COVID; correct?

8 A. I didn't need one because I had 61 RVUs, but --

9 Q. And with respect to in addition to your \$360,000 clinical
10 compensation, NYU also paid expenses attendant with your
11 practice; correct?

12 A. Yes.

13 Q. And that would be like if you attended seminars out of
14 town; correct?

15 A. They would pay for CME, yeah, continuing medical education.

16 Q. And you would be able to fly to a seminar, stay in a hotel,
17 attend the seminar, and that would all be paid by NYU; correct?

18 A. Yeah, depending on the, yes, hotel. Modest accommodations.

19 Q. Not talking the Bellagio or anything like that?

20 A. No. No.

21 Q. Do you have a recollection of in those years, the '17 to
22 '21, attending conferences and submitting expenses?

23 A. 2017, '18, and '19, not since then.

24 Q. And approximately, what were those expenses that you put in
25 and how much did you receive in reimbursement from NYU?

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Modi - Cross

1 (Jury present)

2 THE COURT: Mr. Steer you may inquire.

3 CROSS-EXAMINATION

4 BY MR. STEER:

5 Q. Good morning, Dr. Modi.

6 A. Good morning.

7 Q. You understand you're not a defendant in this lawsuit?

8 A. Yes.

9 Q. And where do you work?

10 A. NYU Langone.

11 Q. And where?

12 A. Huntington in Long Island.

13 MR. STEER: Your Honor, may we publish exhibit 46 in
14 evidence, please, his curriculum vitae.

15 THE COURT: Yes. Have you got a question?

16 MR. STEER: May we publish it to the jury?

17 THE COURT: Yes.

18 MR. STEER: Oh, I'm sorry, your Honor.

19 Q. Dr. Modi, your curriculum vitae that we looked at a few
20 minutes ago, does it fairly and accurately reflect your
21 background, your education, and your job experience?

22 A. Yes.

23 Q. Now, you show on the CV that you were the chief of
24 rheumatology for former QLIMG, Queens Long Island Medical
25 Group; correct?

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Modi - Cross

1 A. Correct.

2 Q. What was Queens Long Island Medical Group?

3 A. It was a multi-specialty group of about 500 physicians
4 located in Queens and Long Island.

5 Q. And as the chief rheumatology, what were your duties?

6 A. Be the liaison between the rheumatologists in the group and
7 administration leadership to kind of discipline them or improve
8 the quality of care standards, as well as a connection between
9 the physicians and leadership if there was a need for any
10 modern equipment, approve their CMEs, their vacation time, any
11 connection between leadership and the rheumatology division.

12 Q. And how many rheumatologists did you oversee, if any?

13 A. Six.

14 Q. And you testified earlier that I believe QLIMG was bought
15 by Advantage Care Physicians; correct?

16 A. Yes.

17 MR. KATAEV: Objection. Asked and answered.

18 THE COURT: Overruled.

19 A. Yes.

20 THE COURT: Mr. Kataev, my rule is only one lawyer,
21 and you're not the lawyer for this witness.

22 MR. KATAEV: I apologize, your Honor. I got over --

23 THE COURT: Mr. Labuda.

24 Okay. Go ahead.

25 Q. What was Advantage Care Physicians?

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Modi - Cross

1 A. Advantage Care Physicians basically took over Queens Long
2 Island Medical Group where I served as medical director of one
3 of their offices.

4 Q. And how many physicians did ACP, I'm going to call it,
5 Advantage Care Physicians, ACP, how big was it at the time that
6 you became the clinical director?

7 A. The entire practice was approximately same as Queens Long
8 Island Medical Group, 500 physicians.

9 Q. How many physicians, if any, did you oversee?

10 A. The practice had over 20 offices. I was the medical
11 director of the Hempstead medical office, which comprised about
12 15 physicians, two PAs, two nurse practitioners, seven or eight
13 RNs, and then the rest of it was front desk, receptionists,
14 medical assistants.

15 Q. What insurances did Advantage Care Physicians take, if any?

16 A. They take all insurances. 50 to 60 percent of the
17 patients, because the group is owned by Emblem, 50 to 60
18 percent of patients I saw were Emblem, the other 40 percent or
19 more were other insurance.

20 Q. Are you familiar with a medical group called HIP?

21 A. Yes.

22 Q. What is HIP, to the best of your knowledge?

23 A. HIP is an HMO.

24 Q. Were they affiliated in any way with emblem?

25 A. Yes.

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Modi - Cross

1 NYU about the possibility of being employed there?

2 A. Because of my two colleagues that were very happy with NYU,
3 I reached out to an NYU talent recruiter.

4 Q. After you dealt with the recruiter, did there come a time
5 when you met someone in NYU's faculty group practice?

6 A. Yes.

7 Q. And who is that?

8 A. Who did I interview with?

9 Q. Yes.

10 A. Andrew Rubin and Josh.

11 Q. Josh Swirnow?

12 A. Yes.

13 Q. And how did you pitch yourself to them when you were
14 looking to join NYU, what did you tell them about yourself?

15 A. I told them that I was out in practice for 11 years, so I
16 would come with a lot of experience, I was a very busy
17 rheumatologist, and, you know, I was pretty confident with my
18 patients, really value me as their rheumatologist, as their
19 physician. I was pretty confident that a lot of those patients
20 would eventually come over to NYU, as well. So it's much more
21 attractive to them than hiring, let's say, a new fellow out of
22 training since I'd be coming with some patient panel already.
23 And then I also pitched that I was a medical director, had some
24 administrative experience, had some experience as a chief of
25 rheumatology with the former group, as well.

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Modi - Cross

1 Q. With regard to those discussions, did you negotiate with
2 them about salary?

3 A. I did.

4 Q. And what happened in those negotiations?

5 A. I told them that at Advantage Care, I was overall happy,
6 but I'm not willing to make a lateral career move, you know, I
7 was very happy with my patients, my patients were very happy
8 with me, and I did not want to make a lateral move in my
9 career, meaning, you know, to get the same salary or certainly
10 definitely would not join for a pay cut. So I had requested at
11 least a 10-percent raise in my salary for me to move on and
12 join NYU.

13 Q. And tell us again, please, or perhaps I didn't ask, what
14 was your salary at Advantage at the time of these negotiations
15 with NYU?

16 A. \$328,000.

17 Q. What did you end up being offered as a salary by NYU?

18 A. \$360,000.

19 Q. And how does that compare with your request for a
20 10-percent raise?

21 A. They pretty much met it head on.

22 Q. Was there RVUs that you had your production measured by
23 when were you at Advantage Care?

24 A. Yes.

25 Q. And how many RVUs did you do per year at Advantage Care,

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Modi - Cross

1 let's say in your last year there?

2 A. 6100.

3 Q. Do you have any knowledge, based on your experience as a
4 senior rheumatologist and as a medical director and as a chief
5 of rheumatology, how that 6001 RVUs compares to what
6 rheumatologists generally do throughout the United States?

7 THE COURT: I take it you mean 6100?

8 MR. STEER: I'm sorry. 6100.

9 MR. LABUDA: Objection. Foundation.

10 THE COURT: The objection is sustained.

11 Q. Did you attend conferences when you were at Advantage Care?

12 A. Yes.

13 Q. Did you also review information in the medical profession
14 regarding RVUs and RVU targets?

15 A. Yes.

16 Q. And what was your understanding of what they showed in
17 terms of the level of RVUs that you were generating compared to
18 the general population of rheumatologists?

19 MR. LABUDA: Objection. Hearsay.

20 THE COURT: Overruled.

21 MR. STEER: You may answer.

22 A. Being a previous chief of rheumatology and having some
23 background, 6100 RVUs, when I was at ACP, was equal to top
24 tenth percentile as far as productivity for all rheumatologists
25 in the country. So it's a pretty high bar.

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Modi - Cross

1 Q. And what target, if any, were you given at NYU for your
2 production in RVUs?

3 A. 6100.

4 Q. That's the exact same number that you were doing at
5 Advantage?

6 A. Yes.

7 Q. When you came to NYU, did you have any debt?

8 A. No.

9 Q. No loans?

10 A. No.

11 Q. Did you have an office lease?

12 A. No.

13 Q. Did you have any staff that came with you?

14 A. There was a medical assistant that interviewed with NYU,
15 but there was not negotiated that she has to come with me, it
16 was a choice she made after I joined.

17 Q. Was there a medical assistant there already for your use or
18 if she did not come, what would have happened?

19 A. She was not part of the negotiations at all. It was
20 basically after I joined and signed the contract with NYU, they
21 basically asked me, we could either hire someone brand new that
22 you don't know and we don't know or if you have someone in
23 mind, you could ask them if they'd be interested because if
24 you're working with them and you know they're good, then we
25 would much rather hire someone that you know.

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Modi - Cross

1 testified earlier that Dr. Edelman worked there with you one
2 day a week?

3 A. Yes, one day a week for one or two years.

4 Q. Did you see her each day of the day she was there?

5 A. I mean, not necessarily because she was in a different
6 hallway and I was in a different hallway. So eventually,
7 sometimes we'd cross paths or sometimes --

8 Q. Did you develop any sense, when you were working along with
9 Dr. Edelman in that office, what her hours were while working
10 at the Huntington Medical Group?

11 A. I recall her working from, I believe, 9:00 to 3:00 and then
12 doing administrative or having two hours in the latter part of
13 the day if there were urgent patients or to complete paperwork,
14 so she'd be there probably 9:00 to 5:00, but I think 9:00 to
15 3:00 were the patient hours.

16 Q. Have you, with regard to NYU, have you done anything that
17 has helped them in terms of growing their practice?

18 A. Yes, very much so.

19 Q. And could you explain to the jury why you say that.

20 A. Even though my target of 6100 is my target per year, the
21 last two or three years, I've been doing almost 7000 RVUs per
22 year.

23 MR. LABUDA: Objection. Move to strike. I didn't
24 know where the question was going, your Honor. I thought it
25 was during the period of time in question.

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Modi - Cross

1 THE COURT: I'll strike the testimony.

2 Q. Dr. Modi, what hours do you see patients?

3 A. Monday through Friday, 9:00 to 5:00.

4 Q. And how many days a week do you work?

5 A. Five.

6 Q. And with regard to the growth of the practice that you
7 testified to before -- withdrawn.

8 Did you have a renewal contract at NYU?

9 A. Yes.

10 Q. And I believe we looked at that before.

11 When that contract was renewed, did you receive a new RVU
12 target?

13 A. Yes.

14 Q. And what is that RVU target?

15 A. It went from 59 to 61.

16 Q. And have you been exceeding that RVU target?

17 A. My RVU target for the year -- no, actually, the RVU target
18 remained the same, 6100. I'm sorry.

19 Q. How have your RVUs been in connection with that target?

20 A. They've been exceeding.

21 MR. LABUDA: Objection.

22 THE COURT: Sustained.

23 Q. What RVUs have you produced since the renewal of your
24 contract, if any?

25 MR. LABUDA: Objection.

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(Jury not present)

THE COURT: All right. Be seated.

I take it defendants have a motion.

MR. SCHOENSTEIN: Yes, your Honor.

THE COURT: Mr. Schoenstein.

MR. SCHOENSTEIN: Your Honor, defendants move for a directed verdict on pretty much the entirety of the case for the record. I'm going to go issue by issue for the record so we have it down.

The Court is familiar with the standards for a directed verdict motion, as set forth in *Casmento v. Volmar Construction*, 2022 WL 15773966. In this case, under Rule 50, directed verdict is appropriate because the evidence in favor of movant is so overwhelming that reasonable and fair-minded persons could not arrive at a verdict against it.

Let me start with the parties.

Of the corporate parties, the only correct party here is NYU Grossman School of Medicine. That is the employer of plaintiff as it is currently known. None of those other entities employ her. There is no evidence of any involvement of any of them, other than she read their names in some of the documents. And that's not evidence of what any of them did. They're not needed for the case. NYU Grossman School of Medicine is a division of NYU itself, so we don't need any of these other corporations. They confuse and confound the jury.

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1 They should all be eliminated.

2 THE COURT: And I take it that if a verdict was
3 returned against NYU Grossman School of Medicine -- is that a
4 legal entity that could satisfy a judgment?

5 MR. SCHOENSTEIN: That is a division of NYU itself,
6 which is a legal entity, and there is zero question about
7 judgment satisfaction in this case, your Honor. Zero. I mean
8 hopefully there won't be one, but if there was.

9 THE COURT: OK.

10 MR. SCHOENSTEIN: Now, the Equal Pay Act claim, your
11 Honor, has not been substantiated.

12 First of all, she was not doing a substantial -- a job
13 with substantially equal skill, effort and responsibility of
14 the comparators. She was below all three of them in
15 productivity. Two of them, Goldberg and Porges, had different
16 jobs and responsibilities. Modi was much more productive. She
17 was not doing substantially equal work, which is the second
18 factor, because her RVUs were substantially less than the
19 others. But really where this case turns on the Equal Pay Act
20 is the affirmative defense of a factor other than sex.

21 Respectfully, your Honor, there is no evidence that
22 sex played any role in this, so the only factors that went into
23 a determination of the pay were factors other than sex, and no
24 reasonable juror could disagree about that. The evidence is
25 uniform that salary setters considered financial circumstances;

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1 experience; reputation; business plans, where they had them;
2 compensation needs, where they were advanced by the applicants;
3 etc. Those are factors other than sex, and no other jury -- no
4 reasonable jury could decide otherwise.

5 Separately, your Honor, the willfulness part of the
6 Equal Pay Act must be dismissed. I cite *McLaughlin v. Richland*
7 *Shoe*, 486 U.S. 128. Willfulness depends on a finding that the
8 employer either knew or showed reckless disregard for the
9 matter of whether its conduct was prohibited by the statute.
10 There is zero evidence of disregard by any of the defendants.
11 In fact, the evidence is that they cleared salaries with legal.
12 They cleared salaries with HR. They did outside surveys of
13 salary, both to benchmark and to check gender disparity. There
14 is no evidence that anybody intentionally ignored or willfully
15 ignored law. And the willfulness part should be dropped even
16 if you leave in the Equal Pay Act claims.

17 Now, your Honor asked yesterday why should you do this
18 now instead of after the jury decides, and the answer is
19 simple: Prejudice. It is prejudicial to have claims go to the
20 jury that are not supported by the evidence. They may consider
21 them in rendering verdicts on the other parts of the case. It
22 makes them more likely to find discrimination if they're
23 thinking about equal pay than if the equal pay part is taken
24 out. So it needs to be addressed now.

25 It will also shorten our closing arguments

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1 considerably. But that's not really a factor. The fact is the
2 prejudice. It increases the chance, your Honor, of a
3 compromised verdict if we leave in the case claims that don't
4 belong there. If we leave stuff like willfulness that doesn't
5 belong there, it increases the possibility that the jury will
6 compromise on something in the middle, when the far end of the
7 spectrum has no support whatsoever and should not go to the
8 jury.

9 I want to turn to retaliation.

10 THE COURT: I suppose that argument turns upon me
11 finding that there is some part of the plaintiff's case that
12 would survive a renewed motion.

13 MR. SCHOENSTEIN: Oh, yes.

14 THE COURT: If there's not, then even a compromise
15 verdict wouldn't stand.

16 MR. SCHOENSTEIN: Well, that's true, your Honor.
17 That's true.

18 Retaliation, your Honor.

19 There was no protected activity, and I say that
20 because the complaints here were about office space, not about
21 discrimination. I'm going to cite a case called *Robinson v.*
22 *DeNiro*, recently decided, on May 25, 2023 --

23 THE COURT: I'm aware of it.

24 MR. SCHOENSTEIN: -- by a very good judge.

25 You will see at pages 90 to 91 of your decision, your

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1 Honor, you addressed that buzz words like "harassment" and
2 "toxic work environment" do not establish protected activity.

3 Now, remember, plaintiff's communications never said
4 anything about anyone calling her a bitch. Her communications
5 were that she felt slightly intimidated because a tall guy came
6 into her office and waved his arms. Those were not complaints
7 about discrimination, fairly read. They were not understood by
8 NYU to be complaints about discrimination. There is no
9 testimony that NYU regarded those as actual discrimination, so
10 it was not protected activity on the part, which is a predicate
11 for the retaliation claim.

12 Secondly, it did not cause an adverse employment
13 action. All iterations of retaliation claims, be they Title
14 VII, state law or city law, require proof of causation. There
15 is no such proof in this case. Temporally, it's not close.
16 The allegations, the complaints end in November of 2020, 14
17 months -- well, at least 12 months -- before the alleged
18 adverse employment actions. And the testimony uniformly --
19 every single witness -- was that the prior complaints about
20 office space had nothing to do with the decision to nonrenew
21 the contract, your Honor.

22 The decision was made, agree with it or not, based on
23 the assessment of her clinical practice. So retaliation should
24 be dismissed against everybody, but let me also break it down
25 by defendant, because there are individual defendants here, and

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1 they do not belong in the case.

2 I should add, by the way, that all of the arguments on
3 Equal Pay Act are even stronger as against the individual
4 defendants, Mr. Rubin and Mr. Swirnow, that they should be
5 taken out of the Equal Pay Act claims and the willfulness
6 claims whether or not you take out the others.

7 But on retaliation, Antonik didn't do anything to
8 retaliate. He was asked to put forward some emails, and he
9 did. He actually took notes from another employee, Ms. Ruiz,
10 the most credible witness I've ever seen, and gave them to
11 somebody else, as requested. That's not retaliation.

12 Mr. Kaplan, he didn't do anything. He said stop, put
13 it in writing and send it to the people who make these
14 decisions. If that is retaliation, we are going down a really
15 bad path.

16 Mr. Swirnow didn't do anything. He was involved in
17 discussions, but he didn't take an action or make a decision or
18 do anything that would be retaliation.

19 And Mr. Rubin, although he was the ultimate
20 decision-maker, he was the most removed from the complaints
21 that were supposedly being retaliated against. And his
22 testimony is unimpeachable that he didn't take any of the prior
23 complaints into consideration. He was considering only the
24 clinical factors, and you can't have a retaliation claim
25 against Mr. Rubin.

N7iWede4

1 THE COURT: Could you on a cat's-paw-type theory? I
2 mean assume that there is evidence that Dr. Porges was aware of
3 the complaint and assume that there's evidence that Dr. Porges
4 was motivated by some animus to the plaintiff and that
5 Mr. Rubin was manipulated. Would that support a claim against
6 him or just against NYU?

7 MR. SCHOENSTEIN: I think just against NYU. If
8 Mr. Rubin is manipulated by others that he is considering in
9 good faith, I don't think there's any claim against Mr. Rubin.
10 I think he would have to be out. And the evidence is just
11 overwhelming that he was basing his decision, in good faith, on
12 what he was told by the people he relies upon at NYU.

13 Mr. Steer's handing me a note about cat's-paw. Of
14 course, there is no evidence of animus by Dr. Porges, but I
15 know your Honor was giving me a hypothetical.

16 So let me turn to what's left in the case, which is
17 the discrimination claim itself, which on summary judgment has
18 been limited to the issue of sexist remarks. That is the issue
19 that brings us a case on discrimination. And your Honor here,
20 too, there is no evidence sufficient to have a discrimination
21 claim.

22 Let me start with "smile," "fake it till you make it"
23 and "calm down." Those are not gender-specific comments, and I
24 cite *Cadet-Legros v. N.Y. Univ. Hosp. Ctr.*, 135 A.D.3d 196,
25 from the First Department. Generic terms like "tirade" and "a

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1 leopard does not change its spots" were not racially coded
2 language in the context of that case, and "smile" is not
3 racially coded in this case. I cite for your Honor also
4 *Marseille v. Mount Sinai Hosp.*, 2022 WL 1470098. In that it
5 was the term "aggressive." It was a race-neutral term it would
6 not support. Telling somebody to smile is not discrimination.

7 As I'm going to say to the jury tomorrow, if I have
8 to, we should all smile more.

9 Now, that leaves the alleged "bitch" comment.

10 THE COURT: Just refresh me. "Smile" and "fake it
11 till you make it," were these Rubin and --

12 MR. SCHOENSTEIN: Smile --

13 THE COURT: -- presence?

14 What's the evidence?

15 MR. SCHOENSTEIN: Yes. The evidence is that there was
16 a meeting in 2017, where Dr. Edelman's issues with her staff
17 first came to the attention, and she went in to see Mr. Rubin
18 and Mr. Swirnow. And she testifies -- and no one else really
19 confirmed or expressly denied it -- that Mr. Rubin suggested
20 she smile and that she fake it till she makes it. And
21 Mr. Rubin did not recall saying that, but --

22 THE COURT: I remember his testimony.

23 MR. SCHOENSTEIN: The "calm down" comment is the only
24 comment attributed to Mr. Kaplan. That's his conversation with
25 her in 2020. She says he called her doctor and told her to

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1 calm down and that that somehow was discriminatory.

2 So if we take out all of those, we are left with the
3 allegation that Mr. Antonik muttered the word "bitch," not that
4 he called her a bitch, not that he yelled bitch at her but that
5 he muttered it. As your Honor knows, the laws do not impose a
6 general civility code. Petty slights are not enough to
7 substantiate a discrimination claim. I point again to the
8 *Robinson* case, at page 115, and also *Williams v. N.Y. City*
9 *Hous. Auth.*, 61 A.D.3d 62, another First Department case, under
10 the New York City law, which your Honor mentioned yesterday.
11 And it's "petty slights and trivial inconveniences" are not
12 enough to sustain a discrimination count even under the city
13 claim.

14 Similarly, stray remarks are not enough. I cite for
15 the Court *Fruchtman v. City of N.Y.*, 129 A.D.3d 500. "Stray
16 derogatory remarks, without more," do not constitute evidence
17 of discrimination; and *Harris v. Forklift Systems*, 510 U.S. 17,
18 "mere utterance of an...epithet which engenders offensive
19 feelings in an employee does not sufficiently affect conditions
20 of employment to implicate Title VII." So the Supreme Court
21 case is a Title VII case. Title VII claims should go, but also
22 the city claims.

23 THE COURT: There is no Title VII discrimination
24 claim. It's only the city claim.

25 MR. SCHOENSTEIN: Oh, you're right. Fair enough.

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1 Also, your Honor, with respect to the 2017 comments,
2 they would be time-barred, right? Because the complaint wasn't
3 filed until January of 2021, so none of the 2017 remarks could
4 come in.

5 THE COURT: Does that include the "calm down" from Mr.
6 Kaplan?

7 MR. SCHOENSTEIN: No. "Calm down" from Mr. Kaplan is
8 2020. The 2020 remarks are Mr. Kaplan saying, "Calm down,
9 Doctor," or "Doctor, calm down," and Mr. Antonik allegedly
10 muttering the word "bitch."

11 Let me go here again for the Court by individual
12 defendant, because all four defendants are named on this claim.

13 Mr. Swirnow, there's no proof that he said anything
14 ever at any time that was considered discriminatory, in 2017,
15 2020, or ever. So he's out.

16 Mr. Kaplan simply said "calm down," allegedly, in a
17 conversation where he was very polite and left immediately when
18 he was requested to do so by plaintiff. So he has to be out.

19 Mr. Rubin said only, in 2017, allegedly, "smile more"
20 and "fake it till you make it." Those are out by statute of
21 limitations. They are also out because they are not sufficient
22 to set forth a discrimination claim.

23 That leaves Mr. Antonik, and the sole basis, the only
24 basis is this claim that he muttered the word "bitch." And I
25 know your Honor will not take out that part of the case simply

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1 because it's not an allegation that was made anytime while
2 plaintiff was employed by NYU or in the complaint or in the
3 amended complaint or in the second amended complaint. That's
4 for argument to the jury. But existing alone, that one-word
5 muttering cannot support a discrimination claim under any of
6 the laws at issue in this case.

7 Finally, your Honor, I turn to damages.

8 Whether or not you leave any claims in the case will
9 affect this, but let me address a few specific things.

10 Plaintiffs are still claiming back pay and front pay.
11 There is no back pay proof in the case. There's no loss of
12 revenue. She didn't go a day unemployed or miss a check. So
13 they have only front pay, and the front pay, as I understand
14 it, is based on retirement benefits. And I'll say to the
15 plaintiff the same thing that I've been saying to all of our
16 witnesses: Where are the documents?

17 There's no proof of any retirement benefits that she
18 had or lost. There's no documentary proof that she doesn't get
19 retirement benefits now. It is very short, unspecific
20 testimony by her, so front pay should be out.

21 The pain and suffering claim was limited to \$50,000 in
22 the pretrial submission. Suddenly, in the amended disclosures
23 we got the other night, it had a \$250,000 number. They're not
24 going to give the jury a number, but for the record, that
25 portion of their case must be limited to the 50,000 that was in

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1 their pretrial submission.

2 And that leaves us, your Honor, with punitive damages.

3 Respectfully, no jury could award punitive damages on
4 this record. There is no evidence of the type of gross
5 behavior or conduct that willfully or wantonly causes harm to
6 another. They don't approach meeting the standard of punitive
7 damages, and it should be removed from the charge if any of
8 these claims remain, again, so that there's no risk of a
9 compromise verdict, so there's no risk of the jury saying,
10 well, we won't give her punitive damages, but we'll give her
11 some compensatory damages. It's prejudicial to go forward
12 without an evidentiary basis.

13 Thank you, your Honor.

14 THE COURT: Thank you.

15 All right. I'll hear from the plaintiff responses
16 with respect to anything that the plaintiff wants to respond to
17 but, in particular, why any corporate defendant, if anybody
18 stays in the case, should stay in other than the NYU Grossman
19 School of Medicine; why willfulness should stay in the case;
20 why any of the individuals should stay in the case; and why, in
21 particular, any of the individuals with respect to the
22 discrimination claim, other than perhaps Antonik; and then
23 finally, why I should instruct on punitive damages.

24 MR. KATAEV: I'll address each of them *seriatim*, your
25 Honor.

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1 There is no evidence in the case with respect to the
2 corporate defendants on both sides. There's an agreement that
3 the NYU Grossman School of Medicine employed her, but that's a
4 division of NYU. They did not specify which corporate entity
5 of NYU it's a division of. Moreover, the contract --

6 THE COURT: If there's no evidence in the case with
7 respect to the corporate defendants on both sides and you've
8 got the burden, isn't it game over?

9 MR. KATAEV: No, your Honor, because the contract
10 specifically provides who the employer is, and it makes
11 reference to all of those corporate entities. And we pointed
12 that out during the plaintiff's testimony. The jury can make a
13 determination based on what the contract says and based on what
14 the testimony was.

15 It's also a factual inquiry that should go to the
16 jury.

17 Moving on to the EPA, this is a very fact-intensive
18 issue. There's been testimony about Drs. Porges, Goldberg and
19 Modi. The defendants have shifting explanations for each
20 defendant. None of them is consistent.

21 For example, they reference this clinical and research
22 work and the administrative work. Everyone agrees that the
23 administrative work was only 5 to 10 percent of effort. Each
24 doctor consistently testified that the primary duty was seeing
25 patients. Substantially equal is substantially equal. It's

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1 155. The explanation for why one doctor was paid more does not
2 apply consistently with why another male doctor was paid more.
3 So they have to apply their explanations doctor by doctor in
4 order for it to work. It doesn't work that way. It's a
5 totality-of-the-circumstances test. They say there's no
6 evidence that sex played a role, but the evidence is that the
7 female doctors earned substantially less.

8 We heard Dr. Mehta's testimony, an independent,
9 unbiased witness. In fact, she would be more biased to her
10 current employer. She conceded on the stand that it was unfair
11 that she received less pay and had to do more work than
12 Dr. Goldberg. His effort for administrative duties was 10
13 percent, your Honor. He was paid \$25,000 for that work. He
14 spent time seeing patients. He was so busy seeing patients his
15 bonus for the 1 percent was off the charts. That's why his
16 compensation increased so much. It doesn't make any sense. It
17 doesn't jibe. They don't meet unequivocally the
18 factor-other-than-sex test for their affirmative defense. They
19 have not met their burden, and the jury should decide that.

20 Going to willfulness, I have case law that I'd like to
21 place on the record on this issue. They say that there's zero
22 evidence of disregard. First of all, Mr. Rubin testified at
23 his deposition and confirmed at trial that he did not even know
24 about the Equal Pay Act. Not knowing about a law that's been
25 enacted since 1963, approaching its 50th anniversary, is

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1 that that interaction was motivated by discriminatory animus.

2 THE COURT: Why wouldn't that just be a petty slight?

3 MR. KATAEV: It wouldn't be a petty slight, your
4 Honor, because based on the facts and circumstances of this
5 case, in a medical office, in a professional environment, this
6 rises way above a petty slight or trivial inconvenience.
7 Doctors are given respect in the world at large. People
8 respect doctors, and people don't call doctors a bitch,
9 especially a person who is a site director.

10 THE COURT: Basically what you're asking me to do is
11 accept the proposition that it's OK to use that in a blue
12 collar setting, but because this person happens to have gone to
13 osteopathy school, it's not OK.

14 MR. KATAEV: I understand the Court's concerns with
15 that, but in terms of reviewing the totality of the
16 circumstances, I think that the place where it occurred is
17 relevant, your Honor, and it should be considered.

18 There's also a concern that she raised in this
19 complaint about being concerned about being physically
20 assaulted. That should go together with the comment and the
21 general conduct that occurred.

22 The jury had an opportunity to observe Mr. Antonik.
23 They saw how big he was. They saw how he responded to
24 questions. They saw his demeanor, and they should have the
25 right to make that determination. Again, defendants would not

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1 were handled quickly.

2 THE COURT: No, no. That's out of the case. The only
3 thing that's in the case on discrimination is the couple of
4 comments. We're talking about retaliation, so why don't you
5 march through retaliation, and then you can get to the couple
6 of comments on discrimination.

7 MR. KATAEV: I would just also say that all the
8 evidence that the defendants rely on in terms of retaliation is
9 self-serving. They don't --

10 THE COURT: So is yours.

11 MR. KATAEV: But we have documents, your Honor.

12 THE COURT: I don't think so.

13 Go ahead.

14 MR. KATAEV: The point is, your Honor, that this is
15 also a fact-intensive inquiry that requires an assessment of
16 the totality of the circumstances, and the lack of evidence by
17 the defendants, the lack of documentary evidence, the cloak and
18 dagger -- "I'll call you"; "fill me in on what happened" -- no
19 memorialization, is something that the jury should consider as
20 to whether there was a retaliatory motive involved in Dr.
21 Edelman's --

22 THE COURT: Let's walk through the individual
23 defendants.

24 Antonik, there's no evidence whatsoever of his
25 involvement in an action that would constitute an adverse

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1 THE COURT: Good afternoon.

2 The Court is prepared to give you its ruling on
3 defendants' motions for judgment as a matter of law. The Court
4 assumes familiarity with the applicable legal principles as set
5 forth in *Casmento v. Volmar Construction, Inc.*, 2022 WL
6 15773966 (S.D.N.Y. Oct. 28, 2022).

7 The Court grants judgment as a matter of law to
8 defendants on the issue of willfulness under the Equal Pay Act
9 and New York Equal Pay Act claims. I am convinced by
10 plaintiff's letter that if there was evidence to support
11 willfulness, it should go to the jury. However, the evidence
12 in the record is insufficient for a reasonable jury to find
13 that defendants knew that they were violating the law or showed
14 reckless disregard for whether they were violating the law.
15 Negligent conduct is not willful conduct. Although Rubin
16 testified that he did not know the requirements of the Equal
17 Pay Act, he also testified that he relied on the HR and legal
18 departments, which reviewed all contracts before they were
19 permitted to be signed and go into effect, and that all
20 contracts were benchmarked and surveyed for gender equality.

21 The Court grants judgment as a matter of law for
22 Kaplan on all claims of retaliation. There is insufficient
23 evidence in the record for a reasonable jury to conclude that
24 Kaplan had any retaliatory intent or that he had any
25 involvement in any adverse action.

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1 The Court also grants judgment as a matter of law for
2 defendants Kaplan, Rubin and Swirnow on the discrimination
3 claims. The evidence shows, at most, that Rubin stated to
4 plaintiff, in Swirnow's presence, to "smile more" and "fake it
5 till you make it" during a meeting to counsel her on
6 interpersonal relations, but those claims are barred on statute
7 of limitations grounds, and the continuing violation doctrine
8 does not apply. In addition, at most, they constitute petty
9 slights. In addition, plaintiff does not dispute an award of
10 judgment for Swirnow. The statement attributed to Kaplan that,
11 when plaintiff got upset he said "calm down" is, at most, a
12 mere petty slight and petty inconvenience, and keeping the
13 claim in would otherwise turn the city human rights law into a
14 civility code. There is no evidence from which a jury could
15 find that it was discriminatory.

16 On damages, defendants are granted judgment on the
17 claim for punitive damages. There is no evidence from which a
18 reasonable jury could find that defendants engaged in gross
19 misbehavior or conduct that willfully or wantonly caused hurt
20 to another or engaged in willful or wanton negligence or
21 reckless conduct or consciously disregarded the rights of the
22 plaintiff.

23 The jury will not be charged on back pay, as agreed by
24 the plaintiff.

25 The charge will be amended to reflect these